



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 28, 2005

Mr. Loren B. Smith  
Olson & Olson L.L.P.  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019

OR2005-00848

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 217732.

The City of Friendswood (the "city"), which you represent, received a request for incident, training, and personnel records relating to a named individual within a specified time interval. You contend that the requested information is not subject to the Act. In the alternative, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered your arguments and have reviewed the information you submitted.

Initially, we address your contention that the Act is not applicable in this instance. The Act is applicable to "public information." See Gov't Code § 552.021. "Public information" is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

*Id.* § 552.002(a). Thus, virtually all information that is in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.*

§ 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In this instance, you assert that the requested information is not subject to the Act because it pertains to an individual who is a volunteer firefighter and who receives no compensation for his services. We disagree. Regardless of whether information relates to a paid employee of a governmental body, a volunteer, or any other individual, information is subject to public disclosure under the Act if it constitutes "public information" as defined by section 552.002. In this instance, the submitted information clearly appears to be held by the city "in connection with the transaction of official business." Gov't Code § 552.002(a). Therefore, the submitted information is subject to the Act and must be released, unless an exception to disclosure is shown to be applicable. Accordingly, we will address your other arguments against disclosure.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See* Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold requested protected health information from the public only if an exception to disclosure in subchapter C of the Act applies.

Next, we address your claim under section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We conclude that none of the submitted information is confidential under the ADA, and therefore none of the information may be withheld on that basis under section 552.101 of the Government Code.

You also raise section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). A social security number is confidential under section 552.101 in conjunction with the federal law if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). As the submitted information does not include a social security number, the city may not withhold any of the submitted information under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code.

You also assert that some of the submitted information may be confidential under sections 181.001 and 181.101 of the Health and Safety Code. Section 181.101 provides that "[a] covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to . . . (3) uses and disclosures of protected health information, including requirements relating to consent[.]" Health & Safety Code § 181.101(3). We note, however, that section 181.101 was repealed effective September 1, 2003. *See* Act of April 10, 2003, 78<sup>th</sup> Leg., R.S., ch. 3, 2003 Tex. Sess. Law Serv 5, *repealing* Acts 2001, 77<sup>th</sup> Leg., R.S., ch. 1511, § 1, 2001 Tex. Gen. Laws 5384. Furthermore, section 181.001 consists of definitions, not provisions under which information is expressly made confidential. *See* Health & Safety Code § 181.001; Open Records Decision No 658 at 4 (1998) (statutory confidentiality provision must be express; confidentiality will not be inferred from statutory structure). Therefore, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with sections 181.001 or 181.101 of the Health and Safety Code.

You also raise section 552.101 in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the public availability of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We conclude that the submitted documents do not contain any information that is confidential under the MPA.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common-law right to privacy protects certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

You assert that the submitted documents contain personal financial information that is protected by common-law privacy. We conclude, however, that none of the submitted information is excepted from public disclosure on privacy grounds under section 552.101.

Next, we address your claim under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. You inform us that the individual to whom the submitted information pertains is a peace officer under article 2.12. Based on your representation, we have marked information that the city must withhold under section 552.117(a)(2).

You also raise section 552.130. This section excepts from public disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification documentation issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). Section 552.130(a)(1) is applicable to information that relates to a Texas motor vehicle operator's or driver's license or permit. Section 552.130(a)(2) is applicable to information that relates to a Texas motor vehicle title, vehicle registration, or vehicle identification number. Section 552.130(a)(3) is applicable to information that relates to a personal identification document issued by an agency of the State of Texas or a local agency in this state. We conclude that the submitted documents do not contain any information that is excepted from disclosure under section 552.130.

In raising section 552.130, you also cite to section 521.052 of the Transportation Code. This section states that "[e]xcept as provided by Sections 521.045, 521.046, 521.049(c), 521.050, and 601.022, and by Chapter 730 [of the Transportation Code], the [Texas Department of Public Safety] may not disclose information from the department's files that relates to personal information, as that term is defined by Section 730.003 [of the Transportation Code]." Transp. Code § 521.052. Thus, section 521.052 specifically regulates the disclosure of information by the Texas Department of Public Safety. Consequently, section 521.052 is not applicable in this instance.

Lastly, we note that the submitted documents contain e-mail addresses. With regard to this information, section 552.137 provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137.<sup>1</sup> Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address

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<sup>1</sup>Unlike other exceptions to disclosure under the Act, this office will raise 552.137 on behalf of a governmental body, as it is a mandatory exception and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under section 552.137. Likewise, this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

We have marked e-mail addresses that the city must withhold under section 552.137, unless the individual to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.

In summary: (1) the city must withhold the marked information that is excepted from disclosure under section 552.117(a)(2); and (2) the city must withhold the marked e-mail addresses under section 552.137, unless a particular e-mail address belongs to an individual who has affirmatively consented to its public disclosure. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

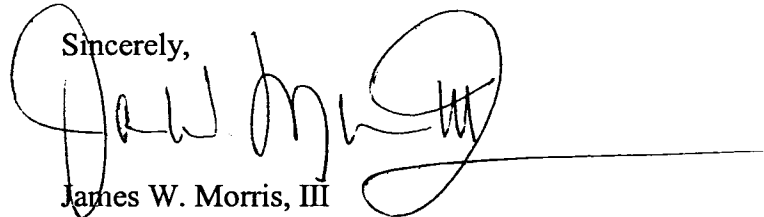
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 217732

Enc: Submitted documents

c: Ms. Sallye A. Clark  
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(w/o enclosures)